

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUTH MAE LEWIS,

Plaintiff-Appellee,

v

SHELLY LYNN McCURDY,

Defendant-Appellant.

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UNPUBLISHED

March 7, 2000

No. 210605

Oakland Circuit Court

LC No. 97-537128-NI

Before: Jansen, P.J., and Collins and J. B. Sullivan\*, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the March 6, 1998, order of the trial court denying her motion to set aside a February 5, 1998, order of default and default judgment in plaintiff's favor pursuant to MCR 2.603(D). We affirm in part, reverse in part, and remand.

Plaintiff filed this negligence action against defendant seeking recovery for injuries she sustained when defendant's car allegedly struck the rear of her car while plaintiff was stopped at a traffic signal. The trial court granted plaintiff's motion for default pursuant to MCR 2.603(D) when defendant's attorney failed to attend a scheduled pretrial conference. At the same time, upon plaintiff's request, the court also entered a default judgment in the amount of \$45,000 against defendant.

Defendant subsequently filed a motion in the trial court titled "Defendant's Motion to Set Aside Default." She argued that her attorney failed to attend the pretrial conference because counsel's secretary erroneously entered the wrong time for the pretrial conference when she scheduled it on defense counsel's calendar. Defendant also asserted that there were meritorious defenses to plaintiff's negligence action. First, defendant argued that plaintiff's act of stopping suddenly at a yellow light caused a "sudden emergency," which made it impossible for her to stop in time to avoid hitting plaintiff. Defendant also contended that plaintiff could not recover non-economic damages in tort under the no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, because she did not incur a serious impairment of body function in the accident. See MCL 500.3135(1); MSA 24.13135(1). The trial court denied defendant's motion.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On appeal, defendant first argues that the trial court should have granted her motion to set aside the default. Whether a default or default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

We analyze the question whether the trial court abused its discretion in refusing to set aside the default entered against defendant for her attorney's failure to attend the pretrial conference pursuant to the standard set forth in MCR 2.603(D), which states, as pertinent:

**(D) Setting Aside Default.**

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed

(a) before entry of judgment, or

(b) if judgment has been entered, within 21 days after the default was entered.

“Good cause” sufficient to warrant setting aside of a default or a default judgment has been understood to include: “(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.” *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 230; 600 NW2d 638 (1999) (quoting 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 662). As the Supreme Court recently clarified, MCR 2.603(D) calls for a court to engage in two discrete inquiries before granting a motion to set aside a default:

The first two prongs of the Honigman & Hawkins “good cause” test are unremarkable and accurately reflect our decisions. It is the third factor, “manifest injustice,” that has been problematic. The difficulty has arisen because, properly viewed, “manifest injustice” is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the “meritorious defense” and “good cause” requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy “good cause” by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the “good cause” showing that is necessary. In other words, if a party states a

meritorious defense that would be absolute if proven, a lesser showing of “good cause” will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Id.* at 233-234. (Footnote omitted).]

We conclude that the trial court did not abuse its discretion in denying defendant’s motion to set aside the default entered against her. Under MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

- (a) be made on personal knowledge;
- (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
- (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

Defense counsel’s affidavit does not satisfy the personal knowledge requirement of MCR 2.119(B)(1)(a), because there is no indication that defense counsel had firsthand knowledge of the facts alleged to establish the defenses. Rather, counsel had only secondhand knowledge gained from defendant, as well as doctors who allegedly examined plaintiff and concluded that her injuries did not amount to a serious impairment of body function. See *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988). Furthermore, it does not appear that defense counsel could testify competently as to the hearsay statements of defendant and the doctors. See MRE 802.

Additionally, defense counsel’s allegations are conclusory and, therefore, insufficient to establish a meritorious defense. *Miller, supra* at 488. Defense counsel stated merely that plaintiff stopped unexpectedly and concluded that the surprise stop created a sudden emergency, but did not recite further facts, such as road and traffic conditions, to support her allegation that it actually was impossible for defendant to stop in time to avoid hitting plaintiff. In any event, defendant’s claim of “sudden emergency” simply suggests that plaintiff was comparatively negligent. If established, it would reduce the amount of plaintiff’s recovery, but would not bar recovery altogether. See *Jennings v Southwood*, 446 Mich 125, 130-132; 521 NW2d 230 (1994).

As to defendant’s alleged no-fault defense, defense counsel based her statement on the conclusions of two doctors who allegedly found that plaintiff “did not have a disability from the automobile accident” and did not require treatment or daily assistance for her injuries. To establish a serious impairment of body function, a plaintiff is required to show an objectively manifested impairment of an important body function which affects the person’s general ability to lead a normal life. MCL 500.3135(7); MSA 24.13135(7); *Gunsell v Ryan*, 236 Mich App 204, 208; 599 NW2d 767 (1999). Serious impairment of body function does not require a disability, or a need for daily attention and treatment. Without revealing the factual bases upon which the two doctors allegedly reached their conclusions, defendant has done nothing to demonstrate the existence of a defense under MCL 500.3135(7); MSA 24.13135(7). Because defendant failed to establish the existence of a meritorious

defense to plaintiff's action, the trial court did not abuse its discretion by refusing to set aside the default entered for defense counsel's failure to attend the pretrial conference.

Further, defendant failed to show that defense counsel had a reasonable excuse for missing the pretrial conference. Defendant's argument that the negligence of defense counsel's secretary somehow excused defense counsel from attending the pretrial conference ignores the fact that defense counsel ultimately was responsible for securing her own attendance at the pretrial conference. Generally, a lawyer's negligence is attributable to the client and normally does not constitute a ground for setting aside a default. *Park, supra* at 67. Defense counsel's failure to attend the pretrial conference must also be viewed in context with defendant's apparent attempts to avoid service of process and her repeated instances of non-cooperation during discovery. *Cook v Haynes*, 92 Mich App 288, 291; 284 NW2d 479 (1979). Defendant's explanation of her attorney's failure to attend the pretrial conference fell short of establishing good cause. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to set aside the default entered against her.

Next, defendant argues that even if she was properly defaulted, the trial court abused its discretion in refusing to set aside the default judgment against her because she did not receive proper notice of the request for entry of the default judgment and was denied her right to a jury trial on the question of damages. Defendant raised this issue in a second motion, filed after her initial unsuccessful motion to set aside the court's order. The trial court denied the second motion on the basis that, among other things, the motion was untimely because it was filed more than 21 days after the trial court entered the default judgment against her. See MCR 2.603(D)(2). Plaintiff argues that because defendant's first motion only sought to set aside the default and not the default judgment, and because this Court vacated the trial court's order denying defendant's second motion because it was entered after defendant filed her claim of appeal of the court's denial of her first motion,<sup>1</sup> this issue is not properly preserved for review by this Court.

At the outset, we note that a number of the problems in this case are occasioned by the lack of precision on the part of both parties and the trial court in their use of the terms "default" and "default judgment."<sup>2</sup> Although defendant titled her first motion "Defendant's Motion to Set Aside Default," it appears that the parties and the court understood the motion to include a request to set aside the default judgment as well. Plaintiff argued in opposition to defendant's motion that defendant had notice of the fact that a *default judgment* could be entered against her because the notice requiring her to appear for the pretrial conference stated: "Failure to appear may result in dismissal/default." Moreover, the trial court's order denying defendant's first motion is titled, "Order Denying Defendant's Motion to Set Aside Default Judgment." Finally, plaintiff argued in response to defendant's second motion to set aside the default judgment that "[t]he motion brought has already been denied by the Court."

Furthermore, while defendant must be faulted for failing to raise all arguments in favor of setting aside the default judgment in her first motion, and for filing her claim of appeal of the court's denial of her first motion before the court ruled on her second motion, plaintiff made a motion clearly contrary to court rules for entry of a default judgment at the same time the court granted the default. Although defendant was not present to assert her right to proper notice as provided by MCR 2.603(D), the trial court bears responsibility for ensuring adherence to court rules and fairness in the proceedings before it.

Given the fundamental nature of the court's error in entering the default judgment without the required notice to defendant and without allowing defendant to be heard on the matter of damages, as well as the confusion surrounding the use of the terms "default" and "default judgment," we view the trial court's first order denying defendant's motion to set aside the default judgment as sufficient to preserve defendant's second issue on appeal.

MCR 2.603(B)(1) provides, in pertinent part, as follows:

(1) Notice of Request for Judgment.

(a) A party seeking a default judgment must give notice of the request for judgment to the defaulted party

(i) if the party against whom the judgment is sought has appeared in the action;

(ii) if the request for entry of judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings, or

(iii) if the pleadings do not state a specific amount demanded.

(b) The notice required by this subrule must be served at least 7 days before entry of the requested judgment.

The failure to give notice as required by MCR 2.603(B)(1) satisfies the "good cause" requirement of MCR 2.603(D). *Perry v Perry*, 176 Mich App 762, 769-770; 440 NW2d 93 (1989). Moreover, where "good cause" is shown on the basis of failure to provide proper notice, an affidavit of meritorious defense is not necessary. *Id.* Indeed, this Court has stated that MCR 2.603(B) "expresses a fundamental concept of due process and its observation is mandatory." *Id.* at 770. Accordingly, failure to provide the notice required by MCR 2.603(B)(1) invalidates the default judgment. *Id.* See also *Vaillencourt v Vaillencourt*, 93 Mich App 344, 350; 287 NW2d 230 (1979); *Petroff v Petroff*, 88 Mich App 18, 20; 276 NW2d 503 (1979).

Here, defendant clearly was entitled to notice. She filed a personal appearance in this action and plaintiff's pleadings did not state a specific amount demanded. Given that the trial court entered the default judgment on the same day it defaulted defendant for her attorney's failure to appear, it is also clear that defendant did not receive the required notice. Because the trial court erred in entering the default judgment without providing the notice required by MCR 2.603(B)(1), we reverse the trial court's order to the extent that it denied defendant's motion to set aside the default judgment.

Furthermore, plaintiff was entitled to participate in any proceeding necessary to determine damages in this case. As summarized by this Court in *Perry*:

The purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any

hearing necessary to ascertain the amount of damages or other form of remedy to be granted. This purpose is premised on the distinction between the entry of default and the entry of judgment. The former operates as an admission by the defaulting party that there are no issues of liability, but leaves the issues of damages unresolved until entry of judgment. The latter reduces the default to a judgment for money damages. Once a valid default is taken, the defaulting party remains entitled to full participatory rights in any hearing necessary for the adjudication of damages. [*Perry, supra* at 767; citations omitted.]

Here, the trial court determined the amount of the default judgment solely on the basis of plaintiff's mediation summary and the mediation evaluation of \$45,000 that was accepted by plaintiff but rejected by defendant. Given that plaintiff's pleadings did not state a specific amount of damages and the amount awarded at mediation was not agreed to by both parties, the trial court abused its discretion in determining damages based upon the mediated amount without allowing defendant to be heard on the issue. See *Dollar Rent-A-Car v Nodel*, 172 Mich App 738, 743-744; 432 NW2d 423 (1988); *Meyer v Walker Land Reclamation, Inc*, 103 Mich App 526, 540-541; 302 NW2d 906 (1981). Moreover, because defendant made a timely demand for a jury trial, she is entitled to a jury trial on the issue of damages. *Wood v DAIIE*, 413 Mich 573, 583-585; 321 NW2d 653 (1982); *Dollar Rent-A-Car, supra* at 743.

We affirm the trial court's denial of defendant's motion to set aside the default, reverse the trial court's denial of defendant's motion to set aside the default judgment, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Joseph B. Sullivan

<sup>1</sup> This Court's order vacating the trial court's order denying defendant's second motion also states that it "leaves undisturbed the February 5, 1998 default judgment and March 6, 1998 order of the circuit court denying defendant's first motion to set aside default judgment."

<sup>2</sup> We also note that such imprecision in use of these terms is not uncommon. As explained in 3 Dean & Longhofer, Michigan Court Rules Practice:

MCR 2.603 distinguishes between the entry of default and default judgment. . .

The entry of default provides the basis for the entry of a default judgment. Default judgment may be entered by the clerk in limited circumstances, or by the court, as provided in MCR 2.603(B). Although there is a distinction between an entry of default and the entry of a default judgment, the courts, and even the rules, frequently uses the terms "default" and "default judgment" in a less than precise manner. For example, MCR 2.603(D)(2)(b) uses the term "default" rather than "default judgment" when it states that a default judgment may be set aside "within 21 days after the *default*

was entered.” As there is no requirement that a default judgment must enter within 21 days after the entry of default, the subrule, to be given effect, must be read to refer to the entry of the default *judgment*. . . . [*Id.* at 311.]